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IN THE

Supreme Court of the United States

TIMOTHY IVORY CARPENTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF SCHOLARS OF THE HISTORY AND ORIGINAL MEANING OF THE FOURTH AMENDMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Law enforcement officials wanted to learn where Petitioner Timothy Carpenter was at the time of certain robberies. To figure that out, they obtained records from his cellular service provider showing the movements of his cell phone. Examining those records, they were able to track Carpenter's whereabouts over a four-month period.

Obtaining and examining those records was a "search" in any normal sense of the word—a search of documents and a search for Carpenter and one of his personal effects. It was therefore a "search" within the meaning of the Fourth Amendment. When the Amendment was ratified, to "search" meant to "examine," "explore," "look through," "inquire," "seek," or "try to find." Samuel Johnson, *A Dictionary of the English Language* (10th ed. 1792). Nothing about the text of the Fourth Amendment, or the historical backdrop against which it was adopted, suggests that the term "search" should be construed more narrowly in that Amendment to mean only conduct violating "an actual

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[2] Institution names are provided for purposes of affiliation only.

(subjective) expectation of privacy" that "society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Plainly, by examining and looking through Carpenter's cell site location records to seek the whereabouts of his person and phone, the government agents in this case conducted a "search."

Entrusting government agents with unfettered discretion to conduct searches using cell site location information undermines Fourth Amendment rights. The Amendment guarantees "*[t]he right of the people to be secure* in their persons, houses, papers, and effects, against unreasonable searches." U.S. Const. amend. IV (emphasis added). The Framers chose that language deliberately. It reflected the insecurity they suffered under the British at the hands of "writs of assistance," a form of general warrant that granted state agents broad discretion to search wherever they pleased. Such arbitrary power was "unreasonable" to the Framers, being "against the reason of the common law," Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1270 (2016), and it was intolerable because of its oppressive impact on "the people" as a whole. As emphasized in one of the seminal English cases that inspired the Amendment, this kind of general power to search was "totally subversive of the liberty of the subject." *Wilkes v. Wood*, 98 Eng. Rep. 489, 498 (1763). James Otis's famous speech denouncing a colonial writ of assistance similarly condemned those writs as "the worst instrument of arbitrary power," placing "the liberty of every man in the hands of every petty officer." James Otis, *In Opposition to Writs of Assistance* (1761), *available at* http://hartleby.com/268/8/9.

Thus, although those who drafted and ratified the Fourth Amendment could not have anticipated cell-phone technology, they would have recognized the dangers inherent in any state claim of unlimited authority to conduct searches for evidence of criminal activity. Cell site location information provides insight into where we go and what we do—potentially revealing one's intimate relationships, hobbies, predilections, medical conditions, religious beliefs, and political pursuits. Because this information is constantly generated and can be retrieved by the government long after the activities it memorializes have taken place, unfettered government access to cell site location information raises the specter of general searches and undermines the security of "the people."

The use of more primitive techniques to track a person's movements, such as live visual surveillance in public spaces, does not pose the same threat to the security of the people. Traditional methods require considerable time and resources, making their use limited and infrequent. "The people" can therefore remain secure in their persons and effects against the fear that police might track their movements without a compelling reason to do so. *See United States v. Jones*, 565 U.S. 400, 429 (2012) (Alito, J., concurring in the judgment) ("In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical.").

Today, however, ubiquitous personal electronic devices generate perpetual records of almost everyone's movements, "mak[ing] long-term monitoring [of the people] relatively easy and cheap." *Id.* These developments have fundamentally transformed the state's capacity to track and monitor the people. David Gray, *The Fourth Amendment in an Age of Surveillance* 124

(2017) ("[W]hat is troubling about life in our age of surveillance is the prospect of living in a world where each of us and all of us are subject to the constant and real threat of broad and indiscriminate surveillance."). And if left unchecked, such developments will "alter the relationship between citizen and government in a way that is inimical to democratic society." *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring) (citation omitted).

Searches conducted using cell site location information raise precisely this danger. Today, "it is the person who is not carrying a cell phone . . . who is the exception," *Riley v. California*, 134 S. Ct. 2473, 2490 (2014), and "nearly three-quarters of smart phone users [have] report[ed] being within five feet of their phones most of the time." *Id.* All of these "cell-phone user[s] *must* reveal [their] general location to a cell tower in order for the cellular service provider to connect a call." Cert. Opp. 15 (emphasis added). Because anyone who uses this basic tool of modern life has no choice but to create a perpetual digital trail of his or her movements, the rise of modern cell phones has effectively enabled "twenty-four hour surveillance of any citizen of this country." *United States v. Knotts*, 460 U.S. 276, 283 (1983). Unfettered government access to that data is incompatible with "a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Although the procedures set forth in the Stored Communications Act ("SCA") may limit the government's access to cell site location information, *see* 18 U.S.C. § 2703(c), the Act was passed long before access to telephone records allowed comprehensive tracking of subscribers' movements. As a consequence,

the SCA does not require sufficiently rigorous justifications for government access to this revealing data. Neither does the Act adequately limit the breadth of searches conducted using cell site location information. That shortcoming is evident in this case, where investigators needed location information only for specific times and dates, Pet. App. 6a, but requested and received location data covering more than four months, Pet'r Br. 6-7 & n.4; *see* Pet. App. 52a. Because of these flaws, the SCA does not sufficiently guard against threats of unreasonable searches and seizures.

ARGUMENT

I. Seeking the Whereabouts of a Person or Her Effects by Examining Cell Site Location Information Is a "Search"

A. "Words in a constitution . . . are always to be given the meaning they have in common use, unless there are very strong reasons to the contrary." *State of Tennessee v. Whitworth*, 117 U.S. 139, 147 (1886). "Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written." *United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533, 539 (1944).

"When the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.'" *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001) (quoting Noah Webster, *An American Dictionary of the English Language* (1828)); *see* Johnson, *A Dictionary of the English Language*, *supra* (defining "search" as to "examine," "explore," "look

through," "inquire," "seek," or "try to find" by "looking into every suspected place").

Nothing about the text of the Fourth Amendment or the historical context in which it was adopted suggests that the word "searches" should be construed more narrowly in that Amendment. The Fourth Amendment "was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity," *Riley*, 134 S. Ct. at 2494, "often to uncover papers that might be used to convict persons of libel." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990); *see Boyd v. United States*, 116 U.S. 616, 625-26 (1886). These quests for smuggled goods, seditious materials, and the people responsible were "searches" in the ordinary sense of the word—efforts to find persons and things.

Nor was the word "search" reserved in eighteenth-century America for activities that involved crossing the threshold of a home or business. For example, the word had long been used to describe efforts by law enforcement to find people in public places. *See, e.g.*, Webster, *supra* ("to *search* the wood for a thief"); William Sheppard, *The Offices of Constables*, ch. 8, § 2 (4th ed. 1658) ("The Officer receiving a Hue and Cry after a Fellon, must, with all speed, make diligent pursuit, with Horse and Foot, after the offendors from Town to Town the way it is sent, and make diligent search in his own Town."); *The Conductor Generalis: or, the Office, Duty, and Authority of Justices of the Peace* 187-88 (1792) (noting the authority of a constable or sheriff to "search in his town for suspected persons" and advising that "it is a good course to have the warrant of a justice of the peace, when time will permit, in order

to prevent causeless hue and cry"); William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602–1791*, at 320 (2009) (citing English magistrate's order commanding officers "to make diligent search" for able-bodied vagrants (quoting Order, 17 Jan. 1705/6 *in* 3 Buckinghamshire Sessions Records (Le Hardy ed., 1939))); *id.* at 322 (citing English magistrates' report describing "Rogues, Vagabonds, sturdy Beggars, and disorderly Persons apprehended by virtue of search Warrants[,] in Night Houses and other disorderly Houses or such as infest the Streets in the Night-time" (quoting *Magistrate Report, in* London J., at 2 (Apr. 24, 1731))).

As it does today, the word "search" when used in 1791 also encompassed the perusal and inspection of documents for the information they contained. Indeed, the government's pursuit of seditious writings was at the very heart of the English general warrant cases, those "landmarks" of freedom that were "applauded by the lovers of liberty in the colonies." *Boyd*, 116 U.S. at 626. In *Entick v. Carrington*, a case "undoubtedly familiar" to "every American statesman, during our revolutionary and formative period as a nation," *id.* at 626, the King's Bench rejected the notion that libelous materials "may be searched for and seized by whomsoever and wheresoever the Secretary of State thinks fit," condemning general warrants to "enter a man's house, search for and take away all his books and papers." *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765). Pronouncing these searches unlawful, Lord Camden emphasized that the essence of the offense was not the physical confiscation of such documents, but rather state agents' reading and examining them. Papers, he explained, are the owner's "dearest property," which "will hardly bear an inspection." *Id.* at 1066.

B. Eighteenth-century readers would not have regarded physical intrusions as necessary elements of the "searches" addressed in the Fourth Amendment. True, "[t]he text of the Fourth Amendment reflects its close connection to property, since otherwise . . . the phrase 'in their persons, houses, papers, and effects' would have been superfluous." *Jones*, 565 U.S. at 405. But the same text reveals that the Amendment does more than simply protect those listed items from physical intrusion. If that were the Amendment's sole aim, it would merely prohibit "unreasonable searches of persons, houses, papers, and effects." Instead, it prohibits violations of "*[t]he right of the people to be secure* in their persons, houses, papers, and effects, against unreasonable searches." U.S. Const. amend. IV (emphasis added). And that "right . . . to be secure" can be violated by means other than a physical intrusion.

In the material conditions of the eighteenth century, few searches were capable of violating the security of persons, houses, papers, or effects without also physically intruding upon them. But even in the eighteenth century, jurists and statesmen who opposed general warrants made clear that their concerns went beyond physical intrusion to include the dangers of the state accessing *information* and prying into personal matters.

In the celebrated case *Wilkes v. Wood*, for instance, the plaintiff complained that his "papers had undergone the inspection of very improper persons to examine his private concerns," and maintained that "of all offences that of a seizure of papers was the least capable of reparation; that, for other offences, an acknowledgement might make amends; but that for the promulgation of our most private concerns, affairs of the most secret personal nature, no reparation whatsoever could be made." 98 Eng. Rep. at 498, 490.

In *Entick v. Carrington*, it was similarly charged that the defendants had "read over, pried into, and examined all the private papers, books, etc. of the plaintiff . . . whereby the secret affairs, etc. of the plaintiff became wrongfully discovered." 19 How. St. Tr. 1029. Pronouncing this conduct unlawful, Lord Camden explained that "the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass." *Id.* at 1066.

This Court later distilled the principles set forth in *Entick*, a case "in the minds of those who framed the fourth amendment to the constitution" and "considered as sufficiently explanatory of what was meant by unreasonable searches and seizures." *Boyd*, 116 U.S. at 626-27. "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense," this Court explained. "The principles laid down in this opinion," reaching beyond "the concrete form of the case then before the court," condemn "the invasion of his indefeasible right of personal security" and the "privacies of life" when "that right has never been forfeited by his conviction of some public offense." *Id.* at 630; *see Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 479 (1894) ("the right of personal security . . . involves, not merely protection of [a] person from assault, but exemption of his private affairs . . . from the inspection and scrutiny of others").

In the eighteenth century, little information could be gained about the activities inside a home without entering it. And because information could be memorialized only on objects palpable to the touch, "[f]orce and violence were then the only means known" to wrest private knowledge from its possessor. *Olmstead*

v. United States, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting). But "science has brought forth far more effective devices" than those available at the Founding. *Goldman v. United States*, 316 U.S. 129, 139 (1942) (Murphy, J., dissenting). Tools like thermal imagers and electronic trackers can acquire "information regarding the interior of the home that could not otherwise have been obtained" without physical intrusion. *Kyllo*, 533 U.S. at 34-35; *see United States v. Karo*, 468 U.S. 705, 715 (1984). Modern equivalents of traditional "papers," such as audio voice transmissions and electronic documents, can be obtained without physical intrusion because they are "intangible." *Olmstead*, 277 U.S. at 475 (Brandeis, J., dissenting); *see United States v. Warshak*, 631 F.3d 266, 285-86 (6th Cir. 2010) (protecting email as "the technological scion of tangible mail"). And as discussed below, digital innovations like cell site location information now enable the government to track the movements of the entire citizenry with an ease formerly unthinkable.

C. In sum, the meaning of "search" in the Founding era—as today—included seeking the whereabouts of people and their effects as well as examining documents for the information they contained. That definition plainly encompasses looking through cellular location records in order to track the movements of a person and her effects. "Whatever new methods of investigation may be devised" as technology advances, courts must "decide whether the action in question would have constituted a 'search' within the original meaning of the Fourth Amendment." *Jones*, 565 U.S. at 406 n.3. When the answer is 'yes,' "it is quite irrelevant whether there was an 18th-century analog." *Id.*

In this case, law enforcement officials obtained and examined records that revealed the location of Carpenter's cell phone over a four-month period. Pet.

App. 4a-6a. By obtaining and examining those records, they were able to identify Carpenter's whereabouts at regular, frequent intervals—showing, for instance, that he was "right where the first robbery was at the exact time of the robbery." Pet'r Br. 8 (quoting prosecutor's statement to the jury). This conduct fits squarely within the meaning of the word "search" as used in 1791. The government "look[ed] over or through" and "examine[d] by inspection" Carpenter's cell phone records "for the purpose of finding" his phone, and therefore him. Webster, *supra*. Scrutinizing those records to determine Carpenter's whereabouts was plainly an "act of seeking" and an "inquiry." Johnson, *supra*.

D. The government argues that this is a situation "when a search is not a search." *Kyllo*, 533 U.S. at 32; *see* Cert. Opp. 16 (contending that the search of Carpenter's cell phone records was not "a Fourth Amendment search"). Relying on the "third-party doctrine," the government maintains that Carpenter has "'no legitimate expectation of privacy'" in his cell phone records because they contain "'information he voluntarily turn[ed] over to third parties,'" Cert. Opp. 15 (quoting *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979)), and that the Fourth Amendment therefore sets no limits on the government's power to access and use those records. That argument rests on the definition of a "search" introduced in *Katz v. United States*, which artificially narrowed the word's meaning to violations of "an actual (subjective) expectation of privacy . . . that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361 (Harlan, J., concurring).

This reliance on *Katz* denies "the people" their constitutional birthright. The *Katz* test, and its concomitant rule that "secrecy [is] a prerequisite for privacy," *Jones*, 565 U.S. at 418 (Sotomayor, J., concurring),

lacks any basis in the text and history of the Fourth Amendment. "A search is a search, even if it happens to disclose . . . . nothing of any great personal value[.]" *Arizona v. Hicks*, 480 U.S. 321, 325 (1987). Instead of continuing to probe for "understandings that are recognized and permitted by society," *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978)), this Court should acknowledge that searches are searches, and should focus instead—as the text commands—on guaranteeing that the right of the people to be secure against *unreasonable* searches "shall not be violated." *Cf. Ex parte Siebold*, 100 U.S. 371, 393 (1879) ("We may mystify any thing. But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning.").

The Court has inclined toward this plain-meaning approach in the past. Explaining that "warrantless visual surveillance of a home" has always been regarded as lawful, this Court has noted that the most obvious rationale for that rule does not depend on the meaning of "search." Rather, it is that "examining the portion of a house that is in plain public view, while it is a 'search' despite the absence of trespass, is not an 'unreasonable' one under the Fourth Amendment." *Kyllo*, 533 U.S. at 32 (citing *Minnesota*, 525 U.S. at 104 (Breyer, J., concurring in the judgment)). That approach, more faithful to the Amendment's text, also offers a clear path forward in an age when technology and the public's knowledge and expectations regarding that technology are constantly "in flux." *Jones*, 565 U.S. at 427 (Alito, J., concurring in the judgment).

By acknowledging that the government's conduct in this case was a "search," the Court can shift its focus away from a futile inquiry into how well the average

person understands cellular technology, and away from a fruitless quest to identify what "society" is prepared to consider reasonable with regard to the privacy of cell site location information. Instead, this Court can focus on the more straightforward question compelled by the text of the Fourth Amendment: Does granting law enforcement unfettered discretion to access and analyze that information threaten "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches"?

II. The Right of The People To Be Secure in Their Persons and Effects Against Unreasonable Searches Is Violated When the Government Has Unfettered Power To Track The People's Whereabouts Through Their Cell Phone Records

A. Whether a search is "unreasonable" under the Fourth Amendment depends upon how it affects the security of "the people," not merely the security of any individual person. This is evident both from the Amendment's text and from the history that gave rise to it—namely a widespread concern about the general insecurity caused by unconstrained authority to search.

At the time of the Fourth Amendment's adoption, the word "unreasonable" meant "not agreeable to reason" and "greater than is fit; immoderate." Johnson, *supra*. When used in political and legal discourse to describe government searches, the term had taken on a special meaning derived from the English legal tradition, which equated to "against the reason of the common law." Donohue, *supra*, at 1270. Because the common law, which was thought to embody natural reason, had rejected arbitrary search power under general warrants, *see, e.g.*, 2 Matthew Hale, *Pleas of the Crown* 150 (1736) ("a general warrant to search in

all suspected places is not good"), the power to conduct general searches was "against reason," or "unreasonable." *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 555 n.5 (1999) (explaining how John Adams, the principal architect of the Fourth Amendment, was influenced by James Otis's condemnation of writs of assistance as "against reason," a phrase that was "often converted to 'unreasonable' [in] legal and political writings of the time"); *see also* Donohue, *supra*, at 1269-76.

"Unreasonable searches" would therefore have been understood as those that shared the flaws of searches conducted under general warrants—searches not justified by good and sufficient reasons, that went further than those reasons called for, or that were initiated without any process of disciplined reason-giving. *See* Gray, *supra*, at 160-65. That these were the hallmarks of "unreasonable searches" is further illustrated by the Fourth Amendment's Warrant Clause, which indicates that "reasonable" searches are characterized by a good and sufficient justification ("probable cause"), a process of *ex ante* reason-giving before a neutral arbiter ("Oath or affirmation"), and limited discretion (particularity).

Moreover, although the Fourth Amendment confers an individual right to be vindicated by those who themselves are subject to unlawful practices, *Rakas*, 439 U.S. at 133-34, the "unreasonable searches" from which the Amendment protects the individual are those that violate "[t]he right of *the people* to be secure in their persons, houses, papers, and effects." U.S. Const. amend. IV (emphasis added). By protecting the security of "the people" against unreasonable searches, the Framers made use of "a term of art employed in select parts of the Constitution" that "refers to a class

of persons who are part of a national community." *Verdugo-Urquidez*, 494 U.S. at 265; *see id.* at 265-66 (contrasting the term "the people" with "the words 'person' and 'accused' used in the Fifth and Sixth Amendments regulating procedure in criminal cases"); *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008) (explaining that where "the people" is used in the Constitution, "the term unambiguously refers to all members of the political community, not an unspecified subset"). *Compare* Johnson, *supra* (defining "person" as an "individual or particular man or woman"), *with id.* (defining "people" as "a nation; those who compose a community").

The Framers' choice to guarantee a "right of the people" was a conscious one. They borrowed this phrase from the 1776 state constitution of Pennsylvania, which declared that "the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure." Penn. Const. art. X (1776); *see* Davies, *supra*, at 677-78. By contrast, the influential Massachusetts state constitution protected the rights of "[e]very subject" against unreasonable searches and seizures. Mass. Const. pt. 1, art. XIV (1780). Although the Massachusetts provision, which flowed from the pen of John Adams, was in other respects the primary model for the Fourth Amendment, *see* Davies, *supra*, at 678, the Framers notably departed from Adams's approach by protecting "the right of the people."

This formulation spoke more directly to "the purpose of the Fourth Amendment," which "was to protect the people of the United States against arbitrary action by their own Government." *Verdugo-Urquidez*, 494 U.S. at 266; *see Jones*, 565 U.S. at 416-17 (Sotomayor, J., concurring) (referencing "the Fourth Amendment's goal to curb arbitrary exercises of police

power . . . and prevent 'a too permeating police surveillance'" (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948))). Advancing that purpose, the Amendment guards against the corroding effect on the liberty of the people as a whole that would occur if the state wielded unlimited, discretionary power to search and seize. *See Brinegar v. United States*, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting) ("Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. . . . So a search against Brinegar's car must be regarded as a search of the car of Everyman."). "The Fourth Amendment thus gives concrete expression to a right of the people which 'is basic to a free society.'" *Camara v. Mun. Ct.*, 387 U.S. 523, 528 (1967) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)).

The reasonableness of a search must be assessed, therefore, not only with regard to the impact it has on the privacy or property of the individual searched in that case. Consideration must also be given, as the text of the Fourth Amendment indicates, to whether allowing the government to conduct that type of search would violate the security of "the people." *See* Luke M. Milligan, *The Forgotten Right To Be Secure*, 65 Hastings L.J. 713, 738-50 (2014) (explaining that the Fourth Amendment confers on the people a right to be "free from fear" of unreasonable searches). Therefore, the question is whether the decision to engage in a type of search can be left to the unfettered discretion of government agents, free of "oversight from a coordinate branch," *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring), without compromising the security of the people as a whole.

Historical context buttresses this textual inference. Given the heritage of general warrants and

writs of assistance, the Founders feared giving the federal government "free rein to search for potential evidence of criminal wrongdoing." Donohue, *supra*, at 1194. Such broad discretion was intolerable to the Founders precisely because of its oppressive impact on the political community, or "the people," as a whole. *See* Gray, *supra*, at 146-56.

In *Wilkes v. Wood*, for instance, the court condemned the unbounded discretion that general warrants conferred on the officers who executed them. Because general warrants did not require agents to identify particular suspects or to inventory items to be seized, "a discretionary power [was] given to messengers to search wherever their suspicions may chance to fall." 98 Eng. Rep. at 498. In *Money v. Leach*, another of the general warrant cases, the court similarly declared, "It is not fit, that the receiving or judging of the information should be left to the discretion of the officer." 97 Eng. Rep. 1075, 1088 (1765).

Though few people actually were victims of searches conducted pursuant to general warrants, these courts emphasized that the mere existence of such warrants made the entire nation vulnerable to them—depriving the people of security against arbitrary and unreasonable searches. As explained in *Wilkes*, the establishment of general search power "may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject." 98 Eng. Rep. at 498. In *Entick v. Carrington*, the court likewise warned that if general warrants were permitted, "no subject whatsoever is privileged from this search . . . . the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger . . . .

and every house will fall under the power of a secretary of state to be rummaged before proper conviction." 19 How. St. Tr. at 1063, 1071.

In the eighteenth century, therefore, arbitrary and unfettered power to search was viewed as endangering the nation itself. This existential threat, rather than the damage suffered by any individual person, was described as the motivating force behind the verdict of the jury in *Huckle v. Money*: "[T]he small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom[.]" 95 Eng. Rep. 768, 769 (1763). This general search power was all the more perilous because it was traditionally "used to stifle religious and political dissent." Milligan, *supra*, at 749; *see* Cuddihy, *supra*, at 122-23; Donohue, *supra*, at 1208-10.

Challenges to writs of assistance in the American colonies highlighted the same theme: discretionary search authority raised the specter of subjugation to arbitrary power for every citizen, imperiling the political body as whole. "In 1761, the patriot James Otis delivered a speech in Boston denouncing the use of writs of assistance" in *Paxton's Case*. *Riley*, 134 S. Ct. at 2494. Otis declared that the writ being sought was "a power that places the liberty of every man in the hands of every petty officer," representing "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law." Otis, *supra*. Because the writ "is directed to every subject in the King's dominions," Otis declared,

"[e]very one with this writ may be a tyrant . . . . accountable to no person for his doings. Every man may reign secure in his petty tyranny." *Id.* According to a young John Adams, who witnessed the fiery argument, "Otis's speech was 'the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'" *Riley*, 134 S. Ct. at 2494 (citations omitted).

Otis drew special attention to the danger of discretionary search power in singling out targets based on personal animus or other improper motives. As he put it, "Every man prompted by revenge, ill humor, or wantonness, to inspect the inside of his neighbor's house, may get a Writ of Assistance." Otis, *supra*. To show that the "wanton exercise of this power" was "not a chimerical suggestion of a heated brain," Otis related an incident in which an officer, called to task by a judge and a constable for "breach of the Sabbath-day Acts," retaliated against both by ordering the searches of their houses, "from the garret to the cellar," for "uncustomed goods." *Id.* A later commentator similarly warned that "if magistrates had a power of arresting men . . . merely upon their own suspicions, or pretended suspicions, they might cause any person how innocent soever, to be thrown into prison whenever they thought fit." 2 Francis Maseres, *The Canadian Freeholder: In Three Dialogues Between an Englishman and a Frenchman* 246 (1779).

Early decisions in American courts likewise emphasized that the security of the people would be compromised if government officers were given broad, discretionary search powers. *See Frisbie v. Butler*, 1 Kirby 213, 215 (Conn. Super. Ct. 1787) (finding "clearly illegal" a general warrant to search all places that "the complainant should suspect"). Placing such

arbitrary power in the hands of state agents threatened the security of the entire community. *See Grumon v. Raymond*, 1 Conn. 40, 43 (1814) (declaring unlawful "a warrant to search all suspected places" for stolen goods, because "every citizen of the United States within the jurisdiction of the justice to try for theft, was liable to be arrested"). That threat was heightened because unbounded, discretionary search power inevitably invited abuse. *See id.* at 44 ("It would open a door for the gratification of the most malignant passions, if such process issued by a magistrate should skreen [an officer] from damages."); *Bell v. Clapp*, 10 Johns. 263, 266 (N.Y. Sup. Ct. 1813) (explaining that the constitutional checks imposed on the operation of search warrants arose from "a strong jealousy of the abuses incident to them").

Considering the impact on the security of "the people" as a whole if the government were given unfettered power to search is not only faithful to the Amendment's text and history, it is also capable of ensuring that Fourth Amendment rights are not left "at the mercy of advancing technology." *Kyllo*, 533 U.S. at 35. The digital tools employed by government agents today have gone far beyond "augmenting the sensory faculties bestowed upon them at birth," *Knotts*, 460 U.S. at 282, and increasingly exploit the fact that "people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks," *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring). Modern technology, "by making available at a relatively low cost . . . a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track," *id.* at 416, has fundamentally changed the state's capacity to monitor the activities of the people. That develop-

ment, if left unchecked, will "alter the relationship between citizen and government in a way that is inimical to democratic society." *Id.* The Fourth Amendment is directed against this threat and demands checks sufficient to guarantee that "the right of the people to be secure . . . shall not be violated."

B. Protecting the security of "the people" against unreasonable searches requires considering more than simply the *type* of information gathered in a search, and whether it has been "knowingly expose[d] to the public," *Katz*, 389 U.S. at 351, or "third parties," *Smith*, 442 U.S. at 744. Consideration must also be given to the *means* by which the government gathers the information and the overall effect on the security of "the people" if government agents were to enjoy unfettered discretion to employ those means. *See* David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 Minn. L. Rev. 62, 101-02 (2013).

To illustrate, consider the difference between human surveillance and modern tracking technologies. It may be perfectly reasonable under the Fourth Amendment to leave decisions to conduct human surveillance to the unfettered discretion of law enforcement. That is because human surveillance is inherently limited in scope (officers can be in only one place at a time), difficult to conduct on a broad scale (there are only so many police officers), and thus relatively costly in time and money. *See* Gray & Citron, *supra*, at 124-25. These features of human surveillance mean that it is seldom used on a grand scale or for extended periods of time, and even then only for compelling reasons. *Jones*, 565 U.S. at 429 (Alito, J., concurring in the judgment). That, in turn, means that leaving the decision to conduct human surveillance to the unfettered discretion of government agents is unlikely to

threaten "the right of the people to be secure . . . against unreasonable searches and seizures."

By contrast, consider technologies such as global positioning system ("GPS") and radio-frequency identification ("RFID") monitoring. Tracking programs that use these technologies have extraordinary capacity in terms of scope, because GPS and RFID chips are commonly embedded in personal electronic devices, computers, cars, driver's licenses, passports, credit cards, and even clothes. *See*, Gray, *supra* at 23-30. These programs are also highly scalable, because they can be automated and monitored by computers, and are increasingly inexpensive as well. *See Jones*, 565 U.S. at 415 (Sotomayor, J., concurring); *id.* at 429 (Alito, J., concurring in the judgment). Together, these features make granting government agents unfettered access to GPS or RFID technologies a pernicious threat to the security of the people against unreasonable searches, because those technologies can easily facilitate programs of broad and indiscriminate surveillance, condemning each of us to live in fear that we could be surveilled at any time or all the time.

This Court has acknowledged that the distinction illustrated by this example might make a difference under the Fourth Amendment. In *Knotts*, the Court held that it was constitutionally permissible for narcotics officers to visually track the public movements of a suspect without a warrant, even when those efforts were aided by a relatively primitive radio beeper device. *Knotts*, 460 U.S. at 277, 285. In doing so, however, the Court emphasized "the limited use which the government made of the signals" from the beeper, and that the technology merely enhanced the "efficiency" of what was still a resource-intensive effort to track a particular suspect's vehicle during a single journey. *Id.* at 278 (noting that the pursuing officers "lost the

signal from the beeper" at one point and were forced to call upon "the assistance of a monitoring device located in a helicopter").

As the *Knotts* Court explained, the limitations of the beeper technology used there meant that granting officers unfettered access did not raise any danger of "'twenty-four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision.'" *Id.* at 283-84 (quoting respondent's brief). Presciently, the Court promised that "if such dragnet-type law enforcement practices . . . should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *Id.* at 284; *see Jones*, 565 U.S. at 412 (suggesting that while continuous visual observation of a suspect's movements over a four-week period is constitutionally permissible, "[i]t may be that achieving the same result through electronic means . . . is an unconstitutional invasion of privacy").

The threat of dragnet surveillance that was mere speculation in *Knotts* is reality today. Electronic devices that are increasingly essential to modern life now generate, as a matter of course, a perpetual record of a person's movements, "mak[ing] long-term monitoring relatively easy and cheap." *Jones*, 565 U.S. at 429 (Alito, J., concurring in the judgment). What is more, the government is often spared the burden of conducting the monitoring itself because it can simply reap the fruits of routine data gathering by third parties. As a result, the state's ability to track its citizens is no longer constrained by the need to single out particular suspects in advance, or to invest the time and resources that prolonged surveillance demands.

These considerations reveal why it is not "incongruous" to impose constitutional constraints on the use

of GPS technology to monitor a car's movements, "for even a brief time," while allowing the police broader discretion to "follow the same car for a much longer period using unmarked cars and aerial assistance." *Id.* at 425 (Alito, J., concurring in the judgment). The need to devote significant time and resources to any long-term surveillance is precisely why the people can be secure in their persons and effects against the danger that police will track their movements using traditional methods without good reason to do so. *See id.* at 429 ("In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken."). By contrast, GPS technology enables the police to generate "a precise, comprehensive record" of a car's movements with little effort. *Id.* at 415 (Sotomayor, J., concurring). The disparity becomes even greater when police can obtain that comprehensive record from third-party commercial entities well after the events in question have taken place. Such is the case with cell site location information.

Modern cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley*, 134 S. Ct. at 2484; *cf. City of Ontario v. Quon*, 560 U.S. 746, 760 (2010) ("Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification."). By 2014, "nearly three-quarters of smart phone users report[ed] being within five feet of their phones most of the time." *Riley*, 134 S. Ct. at 2490.

As the government acknowledges, "a cell-phone user *must* reveal his general location to a cell tower in order for the cellular service provider to connect a call." Cert. Opp. 15 (emphasis added). Anyone who uses this essential tool of modern life has no choice but to accept the creation of a continuous digital trail of her locations and movements. Perversely, the government argues that this inevitability is why the Fourth Amendment should place no limits on the government's acquisition of that digital trail. *See id.* at 16 (citing *Smith*, 442 U.S. at 745). That position, which permits "technology to erode the privacy guaranteed by the Fourth Amendment," *Kyllo*, 533 U.S. at 34, is utterly backwards if one is concerned about safeguarding the security of the people against the unreasonable and arbitrary use of state power.

When Fourth Amendment analysis focuses on the *method* employed by the government and its potential effects on the security of the people—not just on the information obtained—it becomes clear why certain high-tech means of conducting searches must be subject to constitutional regulation even though searches for the same information using traditional means are not. Government officers can follow people from place to place in search of information about their activities and whereabouts without threatening the security of the people because practical obstacles make it difficult to use this method in excess. But the rise of modern cell phones, "based on technology nearly inconceivable just a few decades ago," *Riley*, 134 S. Ct. at 2484, has given the government ready means to conduct "twenty-four hour surveillance of any citizen of this country." *Knotts*, 460 U.S. at 283. Unfettered government access to these technologies, being inimical to "a society which chooses to dwell in reasonable security and freedom from surveillance,"

Johnson, 333 U.S. at 14, is constitutionally unreasonable. "The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." *Kyllo*, 533 U.S. at [illegible] n.2.

Limitless access to location data is all the more unreasonable because of its potential to reveal "political and religious beliefs, sexual habits, and so on." *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring). "Awareness that the Government may be watching chills associational and expressive freedoms," and "the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse." *Id.* These concerns echo those of the Founding generation, which had learned that discretionary search power, when lodged in the state, is apt to be directed against disfavored ideas. *See supra* at 19.

C. The "imprecise nature" of cell site location information, Cert. Opp. 25, does not ameliorate the problems discussed above. Even when the technology used in a particular case is "relatively crude," the rules this Court adopts "must take account of more sophisticated systems that are already in use or in development." *Kyllo*, 533 U.S. at 35-36. The precision of cellular location data is improving every day. *See* Pet'r Br. 27-29. And in any event, the technology used in this case proved fully capable of establishing Carpenter's proximity to particular places at particular times. *See* Pet. App. 6a.

More problematic still is that the government, in asking this Court to distinguish between GPS data and the location records used here, introduces "vexing" line-drawing problems akin to those that worried the Court in *Jones*. 565 U.S. at 412-13. The government does not explain how precise is *too* precise, and indeed

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"offers no practical guidance for the application of this standard." *Kyllo*, 533 U.S. at 39. To the extent the government suggests that this Court rely on such distinctions to defer consideration of the weighty questions raised by digital location tracking, the government merely asks the Court to perpetuate uncertainty, thereby leaving the people insecure against the threat of unreasonable searches posed by these technologies.

III. The Stored Communications Act's Protections Are Inadequate

The Fourth Amendment sets out an imperative: the right of the people to be secure against unreasonable searches "shall not be violated." To meet that command, the Amendment compels the imposition of limits on the government's ability to deploy certain types of searches. The prime example of such a constraint is found in the Amendment itself, which specifies that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

By requiring probable cause—sworn to by oath or affirmation, and evaluated by a neutral magistrate—along with particularity regarding the place to be searched, the Warrant Clause "prevents the issue of warrants on loose, vague or doubtful bases of fact," promoting the Amendment's "purpose to protect against all general searches," which are inherently "obnoxious to fundamental principles of liberty." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931); *see Davies*, *supra*, at 576-77 (the Amendment "did not simply seek to provide a post-intrusion remedy," but rather "adopted a preventive strategy . . . prohibiting even the issuance of a too-loose warrant");

Milligan, *supra*, at 746-50 (criticism of general warrants focused less on their execution and more on their "issuance," "existence," and "power"). Together, these safeguards protect the people from being "secure only in the discretion of police officers . . . engaged in the often competitive enterprise of ferreting out crime." *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971) (quoting *Johnson*, 333 U.S. at 14).

Similar protections are needed here, given the serious threat that government access to cell site location information poses to the security of the people. *See supra* at 24-27. Although the SCA includes requirements that in some ways resemble those of the Warrant Clause, its protections fall short given the formidable power of location data as a tool for monitoring the activities of the people.

The SCA permits the government to obtain cell site location information if it offers "specific and articulable facts showing that there are reasonable grounds to believe" that the records "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). It does not require the government to limit the records sought, beyond the general requirement of relevance to an investigation, or to demonstrate probable cause, or to provide a sworn statement affirming the facts set forth in the government's application.

These standards fail to impose sufficient constraints on the use of cell site location information to conduct searches. Mere relevance to an investigation does not adequately constrain the scope of the data the government can obtain under the SCA, either in quantity or in duration. That is especially true because of the potential usefulness, or at least perceived usefulness, of exploiting such data in a dragnet-like search for information about potential suspects. *See* Cert. Opp. 25 (arguing that cell site location information is

"particularly valuable during the early stages of an investigation, when the police [may] lack probable cause and are confronted with multiple suspects" (quoting *United States v. Davis*, 785 F.3d 498, 518 (11th Cir. 2015))). For example, the loose relevance standard of the SCA could permit widespread surveillance of all cell phones in a "high crime" area where the government is investigating a rash of ongoing offenses.

Indeed, under a similar legal standard—requiring "a statement of facts showing that there are reasonable grounds to believe that the [records] sought are relevant to an authorized investigation," 50 U.S.C. § 1861(b)(2)(B), multiple federal district court judges over a period of years approved the indiscriminate nationwide collection of calling records because, the government asserted, bulk analysis of such records could reveal "connections between known and unknown international terrorist operatives." *In re F.B.I. App. for an Order Requiring Prod. of Tangible Things*, No. BR 13-109, 2013 WL 5741573, at *6 (FISA Ct. Aug. 29, 2013); *accord ACLU v. Clapper*, 959 F. Supp. 2d 724, 746 (S.D.N.Y. 2013) (rejecting argument that the collection "is too broad and contains too much irrelevant information" to meet the statutory standard, "[b]ecause without all the data points, the Government cannot be certain it connected the pertinent ones"), *aff'd in part, vacated in part, remanded*, 785 F.3d 787 (2d Cir. 2015). Regardless of whether those rulings were correct in the context of the surveillance program at issue, they reveal the elasticity of a standard that requires only relevance to an investigation.

Even on the facts of this case, the overbreadth of collection that the SCA permits is apparent. The government suspected Carpenter of involvement in a number of store robberies. Pet. App. 3a. But rather than limiting its request "to only the days on which the

robberies occurred," the government sought—and the court approved—the acquisition of records showing his locations and movements over five months (152 days), which ultimately yielded more than four months' worth of data (127 days). Pet. 4-5 & n.2; *see* Pet. App. 52a. The records were used in court, however, only to establish that Carpenter was near the sites of four robberies. Pet. App. 6a.

Moreover, by the time the government requested Carpenter's records, it seems already to have had probable cause to arrest him and seek his cell phone records for the specific times of the robberies. *See* Pet. App. 3a (explaining that a fellow suspect had confessed and given information about his accomplices and their telephone numbers); *cf.* Pet. App. 5a (indicating that ultimately seven of Carpenter's associates testified against him at trial); Cert. Opp. 6 ("The government also introduced videotapes and eyewitness testimony placing petitioner near the relevant robbery scenes."). Given this, it would not have unduly burdened the government to obtain a traditional warrant for Carpenter's cell phone records, as the SCA also permits. *See* 18 U.S.C. § 2703(c)(1)(A); *cf. Riley*, 134 S. Ct. at 2493 ("Recent technological advances" have "made the process of obtaining a warrant itself more efficient."). By helping prevent unnecessarily broad data requests, and by ensuring that all requests are justified by facts independently evaluated by a magistrate under a standard of probable cause, such a requirement would "have the salutary effect of ensuring that use of [location data] is not abused," *Karo*, 468 U.S. at 717, thereby guaranteeing the security of the people against unreasonable searches conducted using cell site location information.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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